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No. 84-1117

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP KAIN d/b/a BROCK KAIN,

Plaintiff-Respondent,

vs.

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,

Defendants-Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Within ten days after entry of judgment on a jury verdict against them, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but did not file an alternative motion for new trial under Rule 59, as permitted by Rule 50(b). More than one year after the judgment, the district court entered an order denying the motion for judgment n.o.v., but granting petitioners a new trial under the mistaken belief that petitioners had alternatively moved for a new trial. On appeal, the original judgment was reinstated on the ground that the district court had no authority to order a new trial on its own initiative after the ten-day period specified by Rule 59(d), and that a motion for judgment n.o.v. under Rule 50(b), properly denied, afforded no authority to grant a new trial.

Thus, the question presented is as follows:

Since Rule 59(d) expressly forbids the district court to grant a new trial on its own initiative more than ten days after judgment, may the district court nevertheless do so after it holds that a motion for judgment n.o.v. under Rule 50(b) must be denied?

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and WATSCO, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF IN OPPOSITION

OPINIONS BELOW

Attached in the Appendix to this brief is the order of the entire Court of Appeals entered October 4, 1984 denying petitioners' petition for rehearing and suggestion for rehearing *en banc.*

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Petitioners misquote Rule 50(b) by deleting a portion near the end. The latter portion of this Rule correctly states as follows:

> . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for

in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59(d) provides as follows:

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

STATEMENT OF THE CASE

On October 7, 1980, plaintiff Kain received judgment in his favor on a jury verdict for actual and punitive damages against defendants Winslow Manufacturing, Inc., and its alter ego parent, Watsco, Inc., for knowingly assisting a co-defendant, Peel's Friendly Supply, Inc., in a pattern of unfair competition which put Kain out of the beauty salon supply business in Wichita, Kansas.

Within ten days after judgment, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but declined to join a motion for new trial under Rule 59, as expressly permitted by Rule 50(b). The co-defendant Peel's, on the other hand, did include an alternative motion for new trial within its motion for judgment n.o.v.

Defendants supplied the trial court with only a partial transcript of plaintiff's direct testimony in connection with briefs filed by the parties relating to the post-trial motions. On May 15, 1981, the district court heard oral arguments on the post-trial motions. All the briefs and arguments were devoted solely to the filed motions. In the case of Winslow and Watsco, the only point argued was the sufficiency of the evidence to require denial of the motion for judgment n.o.v., under the legal standards related thereto. There was no suggestion that those defendants sought a new trial; nor was there any suggestion that the trial court was being asked to weigh the evidence under the different and less stringent standards related to motions for a new trial under Rule 59.

On November 13, 1981, over thirteen months after judgment, the district court held in favor of plaintiff Kain on all motions which had been filed, briefed and argued, by denying the two motions for judgment n.o.v filed by both sets of defendants; and by denying the alternative motion for new trial filed by defendant Peel's. It was specifically found, as plaintiff had requested, that "The evidence and inferences in this case are such that reasonable persons may reach different conclusions, so a judgment notwithstanding the verdict is unwarranted." (A. 10.)

Nevertheless, the court proceeded to review and weigh evidence on the issue of petitioners' liability under the different "new trial" standards, which permit a trial judge to exercise discretion in weighing the evidence. (A. 9.) The new trial issue was neither briefed nor argued, and only a partial transcript of plaintiff's direct evidence on the liability issue had been supplied to the court.

Contrary to petitioners' present assertion that the district court construed Rule 50(b) as authorizing a new trial, the district court mistakenly thought that petitioners had

filed a motion for new trial, in addition to the motion for judgment n.o.v. Based on this mistake made some thirteen months after the trial, with only a partial transcript of the critical evidence, and with no briefing or argument on the nonexistent motion, the district court granted petitioners a new trial. After stating that "the motion for a new trial by Winslow and Watsco must be granted" (A. 10), the court specifically ordered that petitioners' motion for judgment n.o.v was denied; but further ordered that "defendants' Winslow and Watsco's motion for a new trial is hereby granted. . ." (A. 16.)

Plaintiff could not appeal the nonfinal new trial order; and his otherwise final judgment against Peel's was also rendered nonfinal, under Rule 54(b). After an abbreviated retrial, and adverse judgment, plaintiff promptly filed its notice of appeal from the November 13, 1981, order granting the new trial, seeking reinstatement of the original judgment. (Respondent's App., *infra.*)

On appeal, plaintiff Kain supplied the court of appeals with complete transcripts of the critical evidence proving Winslow's knowing assistance of Peel's unfair competition, most of which evidence had been overlooked by the district court in weighing the evidence under the standards applicable to new trial motions. The overlooked evidence also demonstrated the correctness of the denial of Winslow's motion for judgment n.o.v.

Plaintiff argued that a new trial order would have been a clear abuse of discretion even had a timely motion for new trial been filed. However, he also argued that the district court had no authority to grant a new trial on its own initiative after the ten day limit imposed by Rule 59(d); and that this requirement could not be bypassed, or evaded, merely because defendants had filed a motion for judgment n.o.v. under Rule 50(b).

Circuit Judge McWilliams, writing for the court of appeals, ruled that the district court had no jurisdiction to grant a new trial on its own initiative more than ten days after judgment, under the specific limits imposed by Rule 59(d). Nor, he ruled, does Rule 50(b), either by its terms or by the consistent interpretation by the federal courts, permit the district court to grant a new trial when the losing party has sought only a judgment n.o.v., and has chosen not to file an alternative motion for new trial. Accordingly, the district court's November 13, 1981, order for new trial, made on its own initiative thirteen months after the judgment, "exceeded its authority and jurisdiction."

Defendants-petitioners filed a petition for rehearing with a suggestion for rehearing *en banc*. Judge McWilliams directed plaintiff to file a response. All active judges on the Tenth Circuit Court of Appeals duly considered the petition for rehearing, and suggestion for rehearing *en banc*. On October 4, 1984, the petition and suggestion were denied. (Respondent's App., *infra*.)

ARGUMENT

Petitioners are mistaken in asserting that there is a conflict among the federal courts on the question presented. They are equally mistaken in contending that the settled rule construing Rules 59 and 50(b), applied below, is "unjust." All federal courts which have spoken on the question have uniformly ruled against the position advocated by petitioners. Moreover, this very case exemplifies the lack of due process, the inordinate delay and procedural confusion engendered by the district court's *sua sponte* decision, more than one year after the date of judgment, to grant petitioners a new trial which was never requested, and was never in issue.

I. The Decision Below Correctly Analyzes and Applies Rules 59(d) and 50(b) in Accord With All Other Federal Courts Which Have Ruled on the Issue.

Since petitioners did not file a motion for new trial, it follows that the district court acted on its own initiative in granting the new trial more than one year after the date of judgment. Rule 59, governing procedure for new trial motions, limits the trial court's authority in granting new trials on its own initiative to the 10-day period following the entry of judgment. Accordingly, the trial court's *sua sponte* grant of a new trial, more than a year after judgment, was in contravention of the specific limits of its authority under Rule 59(d), unless it can be said that a motion for judgment n.o.v. under Rule 50(b) automatically includes within it a motion for new trial.

But Rule 50(b) in specific terms makes clear that a motion for judgment n.o.v., does not of itself include a motion for new trial. Rather, it permits the moving

party to join a motion for new trial, or move for a new trial in the alternative, along with the motion for judgment n.o.v. As recognized by this Court in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940), each of these motions "has its own office." The motion for judgment cannot be granted unless, as a matter of law, the opponent of the motion failed to make a case. But the motion for new trial "may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence. . ." (311 U.S. at 251.)

The motion for judgment n.o.v. raises *only* the question whether there is any evidence supporting the verdict and judgment. Once that is answered in the affirmative, the motion must be denied. Therefore, the duty of the opponent of the motion—plaintiff Kain in our case—is only to show enough evidence requiring the motion to be denied. That is what plaintiff demonstrated, and that is what the district court held, in denying the motion.

Since petitioners never moved for a new trial which could invoke the discretion of the trial court in weighing the evidence, plaintiff was under no notice or obligation to summarize all the supporting evidence or to argue its weight. It can thus be seen that when the district court went beyond the motion for judgment n.o.v. to grant a new trial on its own initiative, in a discretionary weighing of evidence more than one year after trial, the action clearly exceeded the limits of authority imposed by Rule 59(d).

Petitioners however, ignore this impediment to their case, and misconstrue other language in Rule 50(b) which permits the court, after determining that the motion for judgment n.o.v. should be ordered, to grant a new trial

to the party who had obtained the judgment, but who would lose the judgment on the motion for judgment n.o.v.

As pointed out in the decision below, under Rule 50(b) the district court may (1) allow the judgment to stand (i.e., deny the motion for judgment); or (2) reopen the judgment and either order a new trial or direct entry of judgment as requested. This discretionary power permits the party who had obtained judgment an opportunity to correct an evidentiary defect in the case. This part of Rule 50(b) reflects the traditional practice in federal and state courts for many years prior to the federal rules. *E.g., Slocum v. New York L. Ins. Co.*, 228 U.S. 364, 380 (1913). Accordingly, it was held in *Cone v. West Virginia Pulp & P. Co.*, 330 U.S. 212 (1947), that the plaintiff, who received judgment on a jury verdict, has the right to present reasons why he should have a new trial, rather than to have judgment entered against him.

The court of appeals thus concluded, citing *Cone*, that where a district court concludes that a motion for judgment notwithstanding the verdict should be granted, the court "is not required to grant the ultimate in relief; it may order lesser relief in the form of a new trial." However, where a district court concludes that the motion for judgment n.o.v. must be denied, then the district court is "without authority under Rule 50(b) to order a new trial." Supporting that conclusion are *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957); *Peterman v. Chicago, Rock Island & Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947; and *Alderman v. Tandy Corp.*, 720 F.2d 1234, 1236 (11th Cir. 1983).

This construction of Rule 50(b) is confirmed by Rule 50(c)(2), which allows the party whose verdict has been set aside on motion for judgment n.o.v. a period of 10 days to seek a new trial. No such right is given to the party

filing the motion for judgment n.o.v. whether denied or granted. His only right is to file a motion for new trial at the time the original motion for judgment n.o.v. is timely filed within 10 days after the judgment. [See Rule 50(c)(1).]

The court below referred to the dissenting view expressed by then Circuit Judge Burger (now Chief Justice), in the *Jackson* case, and by some commentators. *Alderman v. Tandy Corp.*, supra, also recognized that the rule had been the subject of some early criticism, but pointed out:

> Alderman easily could have joined a motion for a new trial with his motion for judgment n.o.v. He chose not to do so. He cannot complain that some unexpected shift in events has made his decision unpalatable in retrospect. (720 F.2d at 1237.)

Two other cases, while not directly in point, provide support for the same prevailing view adopted by the Eighth, Tenth, Eleventh and District of Columbia Circuits. *Tarlton v. Exxon*, 688 F.2d 973, 978 (5th Cir. 1982), *cert. denied*, sub nom. *Diamond M. Drilling Corp. v. Tarlton*, ... U.S. .....; and *American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 948 (3rd Cir. 1984), cite with approval the *Peterman* and *Jackson* cases.

The early criticism of the *Jackson* case, in urging a so-called "liberal" construction of Rule 50(b), failed to consider the precise language of the Rule, and the purposes of Rules 50(b) and 59. That criticism also rested upon the erroneous assumption that the party opposing a motion for judgment n.o.v. is on "adequate notice of a challenge to the sufficiency of the evidence." *Moore's Federal Practice*, § 50.11, p. 50-99. But the truth is to the contrary. The standards for evaluating motions for judgment n.o.v. and motions for a new trial based on

insufficiency of the evidence, are materially different, as noted in *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940). Therefore, notice imparted by the n.o.v. motion is not notice that a new trial is in issue under entirely different standards allowing discretion to weigh the evidence.

Professors Wright and Miller make a full analysis of the language of Rule 50(b), in connection with Rule 59, as well as the purposes and reasons surrounding these provisions. (9 Wright and Miller, *Federal Practice and Procedure,* Secs. 2538, 2539.) They point out the different standards applicable to the two motions, and conclude that if the motion for judgment n.o.v. must be denied, "the court has no power to order a new trial in favor of the moving party, except under the conditions specified in Rule 59(d), unless a motion for new trial has been joined in the alternative with the motion for judgment." (Sec. 2538.)[1]

In short, there exists no conflict among the circuits, which have consistently and soundly construed Rule 50(b) as requiring a party moving for judgment n.o.v. to include a motion for a new trial, in order to authorize the district court to grant that party a new trial.[2]

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1. The earlier edition of this work, 2B *Federal Practice and Procedure,* Barron and Holtzoff—Wright, Rules Edition 1961, Sec. 1079, had repeated Moore's early criticism of the federal court holdings. The re-written, more complete analysis in the present treatise deletes that criticism and fully supports the view taken by the federal courts.

2. Petitioners' attempted reliance on the Advisory Committee's Note (Petition, p. 8), is misplaced. That comment confirms the construction that it is after the court has decided to set aside the verdict, that it may instead grant a new trial.

II. This Case Exemplifies the Soundness of the Decision by the Court of Appeals in Construing Rule 50(b) in Accord With the Other Federal Courts.

This very case vividly demonstrates the lack of due process, the inordinate delay and substantive error which have resulted from the district court's action in awarding a new trial to petitioners many months after the judgment, on its own initiative. The abuse and error sought to be prevented by Rule 59(d), in fixing a ten-day limit for the district court to so act, has here occurred.

After the trial, defendants' counsel had supplied the district court with only a partial trial transcript of plaintiff's direct testimony, omitting critical evidence dealing with Winslow's knowing assistance of Peel's in destroying plaintiff's business. Since Winslow/Watsco filed a motion for judgment n.o.v., and not a motion for new trial, plaintiff proceeded, in briefs and argument, to summarize sufficient evidence requiring the motion to be denied. Plaintiff did not go to the expense of purchasing the additional transcript to make his case complete because it was not needed to defeat the motion for judgment n.o.v. The district court's ruling on petitioners' motion agreed with plaintiff that the evidence and inferences were such that reasonable persons may reach different conclusions, so that "a judgment notwithstanding the verdict is unwarranted."

When, however, the district court proceeded to apply the entirely different standards under a discretionary weighing of the evidence, permissible only under a motion for new trial, it fell into serious factual error. Without an adequate transcript, more than one year after trial, and without briefing or argument thereon, the district court overlooked most of the evidence supporting the jury

verdict and judgment.[3] The district court, as an additional ground for new trial, also ruled that plaintiff's counsel had made inflammatory remarks to the jury, although none of the defendants had raised the point; and the transcript later prepared demonstrated the court's faulty recollection.[4]

For these rulings to have been made with no notice to plaintiff that these questions pertinent to a potential new trial were being considered, is plainly a denial of procedural due process. The only manner in which plaintiff's rights could have been protected was to provide adequate notice that discretionary new trial questions were at issue and were to be determined. Rule 59, as written, provides plaintiff this protection by requiring a motion for new trial to be filed, or by limiting the authority of the district judge to grant a new trial on his own initiative to a ten-day period, when recollections are fresh

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3. On appeal, complete transcripts were prepared so that the appellate court had available the additional evidence of liability overlooked by the district court. With full knowledge that defendant Peel's was engaging in unfair competition for the express purpose of putting plaintiff out of business, Winslow participated in a predatory below-cost sale to Kain's best customer; gave substantial financial assistance in the form of free merchandise, and a line of credit requiring no payment on the account, or interest, during the 15 months it took to destroy plaintiff's business through predatory methods well known to Winslow. These and related forms of assistance, together with evidence of Winslow's attempted concealment of it, are summarized with numerous rceord citations in pages 14-20 of the Reply Brief of Appellant in the court of appeals.

4. Plaintiff's counsel, at trial, referred to some demonstrably altered records obtained from Winslow through persistent discovery. The district court erroneously concluded that counsel was complaining of a failure of Winslow to comply with discovery requirements (a matter for the court, not the jury), whereas counsel in fact merely explained how and when the altered receiving record documents had sought to conceal Winslow's supply of free merchandise which assisted Peel's efforts to eradicate plaintiff's small business. (R. Vol. 15, pp. 178-93; R. Vol. 16, pp. 257-79; R. Vol. 20, pp. 25-28; R. Vol. 20, pp. 37-39.)

and untarnished by a multitude of other events, and a long lapse of time.

Rule 50(b) also provides plaintiff protection by providing for the filing of a motion for new trial, with a motion for judgment n.o.v., if movant so chooses to seek a new trial.

But the misconstruction of these Rules sought by petitioners would leave open this same potential for denial of due process and invitation for error, as has occurred in this very case. The court of appeals, being fully aware of plaintiff's plight, quoted Judge Murrah's opinion in *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U.S. 921, summarizing important, judicial policies applicable here:

> "There is good reason for thus confining the trial court within the narrow limits of its discretionary powers, for it is important in the administration of justice that there shall be an end to litigation, and that issues tried and decided by a jury shall not be lightly set aside. If a case is to be retried, it should be done with dispatch, lest the error of delay outweighs the error of trial."

The initial "error of delay" by the district court, which led to the ensuing errors, was its mistaken assumption that petitioners had filed a motion for new trial. By delaying more than a year after the judgment, the district court forgot that no such motion was filed, and failed to review the pleadings which would have corrected the mistake. For petitioners now to pretend (Petition, p. 19) that the district court made an interpretation of Rule 50(b) on which they relied, is contrary to the record, and cannot

obscure the unfortunate errors which occurred due to the long delay.[5]

CONCLUSION

The decision below correctly construes Rule 50(b) and Rule 59, of the Federal Rules of Civil Procedure, consistently with all other federal courts deciding the same issue. That construction is in full accord with the rationale expressed in this Court's decisions construing these same Rules.

Accordingly, the Petition should be denied.

Respectfully submitted,

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5. Petitioners' reliance on *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. Immigration Service*, 375 U.S. 384 (1964), is also misplaced. Petitioners were not deprived of any remedies or rights of appeal by the ruling below.

APPENDIX

(Filed March 3, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PHILIP KAIN, d/b/a BROCK-KAIN COMPANY, Plaintiff,	)	
vs.	)	Case No. 76-23-C6
WINSLOW MANUFACTURING, INC., WATSCO, INC., & PEEL'S FRIENDLY SUPPLY, INC., Defendants.	)	

NOTICE OF APPEAL

Take notice that plaintiff intends to and does hereby appeal from the order of the district court filed November 13, 1981, setting aside the verdict of the jury, and judgment entered thereon October 7, 1980, adverse to defendants Winslow Manufacturing, Inc. and Watsco, Inc., which order of November 13, 1981, did not become final and appealable until termination of a limited retrial on February 12, 1982.

This appeal is taken from the order of the district court to the United States Court of Appeals for the Tenth Circuit, as by law provided.

Dated: March 3rd, 1982.

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(316) 267-6371
By /s/ Gerald Sawatzky
Gerald Sawatzky
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for plaintiff herein, does hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was mailed, postage prepaid, to Mr. Thomas Kitch, Fleeson, Gooing, Coulson & Kitch, 1600 Vickers KSB&T, P.O. Box 997, Wichita, Kansas 67201; and Mr. Gary W. Davis, Martin, Pringle, Fair, Davis & Oliver, 320 Page Court, 220 West Douglas, Wichita, Kansas 67202, on this 3rd day of March, 1982.

/s/ Gerald Sawatzky
Gerald Sawatzky

SEPTEMBER TERM - OCTOBER 4, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable Wesley E. Brown*

PHILIP KAIN d/b/a BROCK-KAIN CO.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 82-1300
WINSLOW MANUFACTURING, INC., and WATSCO INC.,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellees' petition for rehearing, with suggestion for rehearing in banc, and appellant's response thereto, filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. Judge Brown voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk
By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

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*United States District Judge for the District of Kansas, sitting by designation.